

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000659

03/23/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

STATE OF ARIZONA

DOUGLAS W JANN

v.

SHAWN ALLAN KRUIDENIER

BRIAN F RUSSO

PHX JUSTICE CT-NE
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

NORTHEAST PHOENIX JUSTICE COURT

Cit. No. #2655212

Charge: A. UNSAFE LANE CHANGE
 B. DUI
 C. DUI BAC OVER .08

DOC: 04/24/02

DOB: UNK

This Court has jurisdiction of this criminal appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement since the time of oral argument on January 26, 2004. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Northeast Phoenix Justice Court, and the memoranda and oral arguments submitted by counsel.

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The only issue presented on review is whether the trial court (the Honorable John Zastrow) erred in admitting the results of breath tests after granting a Rule 20 Judgment of Acquittal on the charge of Driving with a Blood Alcohol Content in Excess of .08 [in violation of A.R.S. Section 28-1381(A)(2)]. The record reflects that the trial judge reversed his order and later attempted to reinstate the (A) (2) charge. After counsel agreed that jeopardy had attached, the trial judge allowed his Rule 20 Judgment of Acquittal to stand, but then permitted the prosecution to admit the results of the breath test as evidence on the remaining charge.

These complex issues arose because of a factual question introduced by Appellant's witnesses involving whether the officer who administered the breath test results strictly observed a 15-minute observation period prior to the breath test to ensure that the Appellant had nothing in his mouth during the test. Appellant contended that after the breath test, he told the officer that he had had chewing tobacco in his mouth during the observation period - - and during the breath test. However, the officer never observed Appellant chewing or anything in Appellant's mouth. The officer did not observe Appellant remove anything from his mouth after the test. And, more importantly, the officer did observe the required 15-minute observation/deprivation period prior to administering the breath test. After hearing this evidence, the trial judge concluded that the officer did not observe the required observation/deprivation period and that the breath test results were not admissible as to the (A)(2) charge. The trial judge granted Appellant's Motion for Judgment of Acquittal as to that charge. In clarifying his ruling, the trial judge agreed with Appellee that as to the (A)(1) charge (the remaining DUI count) there was conflicting evidence as to the reliability of the breath test. The trial judge was persuaded that this was an issue of fact to be determined by the jury. Generally, a reviewing court must give deference to a trial judge's factual findings, including findings regarding witnesses' credibility.¹ An appellate court should review those factual findings for an abuse of discretion.²

Review is complicated in this case by the trial judge's reversal of his rulings. However, the trial judge properly reversed himself after hearing the arguments of counsel. The ultimate issue concerning the admissibility of the breath test results on the (A)(1) charge is a question of whether sufficient foundational evidence was established by the prosecution. Admittedly, as evidenced by the trial judge's comments, the evidence was conflicting. The jury could choose to believe Officer Haywood's testimony that he observed a 15-minute observation/deprivation period³ or the jury could believe Appellant's testimony that he had tobacco in his mouth during the breath test.⁴ Thus, this Court concurs with Appellee's position that the reliability of the breath test results was a question of fact for the jury to determine. This Court finds no error in the trial court's ruling concerning the admissibility of the breath test as to the (A)(1) charge.

¹ See State v. Gonzalez-Gutierrez, 187 116, 927 P.2d 776 (1996); State v. Magner, 191 Ariz. 392, 956 P.2d 519 (App. 1988).

² State v. Rogers, 186 Ariz. 508, 924 P.2d 1027 (1996).

³ R.T. of October 30, 2002, at pages 91-100.

⁴ *Id.*, at page 188-190.

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IT IS THEREORE ORDERED affirming the judgment of guilt and sentence imposed in this case.

IT IS FURTHER ORDERED remanding this matter back to the Northeast Justice Court for all further and future proceedings in this case.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT